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In the Supreme Court
OF THE
United States

October Term, 1969

No. 301

Loren J. Pike, as Supervisor of Inspection, Arizona Fruit and Vegetable Standardization Service,
Appellant,

vs.

Bruce Church, Inc.,
a California corporation,
Appellee.

On Appeal from the United States District Court for the District of Arizona

SUPPLEMENTAL BRIEF IN SUPPORT OF MOTION TO DISMISS OR AFFIRM

Appellant's Reply to Appellee's Motion To Dismiss Or Affirm does not undertake to respond to, or to take issue with, the various points and arguments contained in Appellee's Motion. It consists essentially of a repetition of certain arguments advanced in his Jurisdictional Statement, with reference to two propositions:

1. that the Arizona law does not require the construction of a packing shed in Arizona (He contends: "A fundamental error underlying the Appellee's position is the persistent assumption that the State of Arizona, through the Appellant, is requiring the Appellee to construct a packing shed in the State of Arizona,"—page 2) and

2. that no interstate commerce is involved here (He argues: "the regulation in the instant case comes into play prior to the time that the goods have moved in interstate commerce"—page 2).

In light of the more detailed discussion in our Motion, we do not consider further answer necessary and shall make only brief reply with respect to novel aspects of Appellant's argument, to illustrate the basic inconsistency of his position and to make brief response with reference to the case of *Pacific States Box & Basket Co v. White*, 296 U.S. 176, 56 S.Ct. 159 (1935), cited by Appellant to this Court for the first time (page 4).

I

Appellant asserts that the statute of Arizona does not in terms require Appellee to construct a packing shed in Arizona. At the same time, based on his premise that it is only in the packing shed that he can make an inspection of the cantaloupes[1] Appellant acknowledges again,

[1]Actually, as was indicated in Appellee's Motion To Dismiss Or Affirm (at page 36), Appellant is already carrying out inspections in the field, and various other ways and means are possible which he appears not desirous of utilizing. He has consistently maintained that his inspection can be carried out *only* in the packing shed, even to the extent of arguing on the basis of statements in the

as indeed he must, that Appellee must establish a packing shed and facilities at Parker, Arizona, if it is to be permitted to ship its cantaloupes out of the state.[2]

Appellant is, in effect, saying: "The law of Arizona does not in terms require it, but I am interpreting the law so as to require that you build a packing shed. How-

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record which do not support him at all. Thus, from a statement in the record that, at the present time, inspection can "most conveniently and efficiently be done in the packing shed." (Transcript of Hearing of November 15, 1968 (p. 70-71)), he argues that inspection can take place *only* in the packing shed (see discussion, Appellee's Motion To Dismiss Or Affirm, page 22.)

In this regard, Judge Merrill inquired as follows of counsel for Appellant at the Hearing of November 15, 1968, Transcript, page 49, lines 2-6:

"Judge Merrill: It is possible in the field to determine whether the cantaloupes are edible?
Mr. Lee: That is correct.
Judge Merrill: And this can be done——
Mr. Lee: This can be done."

[2]That the inevitable consequence of the Appellant's interpretation of the Arizona law is to require Appellee to establish packing shed facilities at Parker is beyond question. This is expressly declared by Appellant in his Jurisdictional Statement, at page 10, and was noted by Judge Merrill in his questioning at the hearing. In the latter connection, see Transcript of Hearing of November 15, 1968, p. 36, L. 12 to p. 38, L. 13, discussed in Appellee's Motion To Dismiss Or Affirm, pages 21-25). Also see the Transcript at p. 51, lines 2-12, where Judge Merrill stated:

"Judge Merrill: Well, I'll tell you what is still troubling me a little bit in [sic, "is"] the distinction that I have already suggested. I think that what you are doing is creating a hypothetical packing shed, saying you can regulate. . . . You are insisting that we create one so that you can regulate it. This is what I am wondering about, whether we can go that far.
Mr. Lee: Yes, I realize that there are some conceptual difficulties with that . . ."

Appellant, of necessity, reiterates the same statement, in effect, in his Reply, at page 4: "The necessity of a packing shed enters into the picture not because of any requirement of the Appellant or of State law. but solely because of the fact that cantaloupes, unlike certain other fruits and vegetables, can be packed only in a packing shed."

ever, since the law does not in terms require it, you have no grounds for complaint."

This line of argument, advanced here for the first time, asks the Court to look to form and not to substance, an approach which this Court has wisely rejected when measuring state action against constitutional requirements. In the cases which Appellant seeks to distinguish, such as *Toomer v. Witsell,* 334 U.S. 385 (1948) and *Johnson v. Haydel,* 278 U.S. 16 (1928), the statutes involved did not in terms require the complainants to provide facilities in the prohibiting states either. However, this was the practical effect of the application given the statutes by the state authority which was prohibiting the complainants from doing their processing in the neighboring states where they did have their facilities, and this Court considered the consequences to be sufficient ground for holding the threatened action unconstitutional. It is according to the impact of the law, as interpreted and applied by state authority—and not only by its literal terms—that the law must be measured. Here, as in the cases referred to, the effect of the law, as interpreted and applied, is to prohibit interstate shipments of goods unless packed in local facilities; and here, as in the cases referred to, the result is to impose an undue burden on interstate commerce, as the three-judge court found.

In connection with his first point, Appellant asserts that "Arizona is entitled to have interstate buyers know of the fact that these high-quality Parker melons were produced in the State of Arizona"—(page 3). This statement is made in connection with a provision in the

Arizona law that calls for placing on the container the name of the orchard or farm where the fruit or vegetable was produced. However, as the record in this case shows, the containers used by Appellee, in California, which are identical to those prescribed for use in Arizona, do actually have markings on them identifying the product as an Arizona product in season (see Deposition of David Gipe, p. 60). As for interstate buyers knowing where the produce comes from, the record shows further that cantaloupes are bought in carloads by a comparatively small number of wholesale buyers and distributors who purchase directly from the grower, who are in constant touch with growing operations and growing districts, who know at all times where the products they are buying have been grown, and who generally have representatives at the site inspecting the fruit, its condition, quality, etc., to make sure that they are getting what they want. (See, for example, Transcript of Hearing November 15, 1968, p. 83-84).

As for *Pacific States Box & Basket Co.,* to which Appellant refers at page 4, this case involved merely the question whether the State of Oregon could prescribe containers to be used for strawberries and raspberries *when packed in the State of Oregon.* The complainant was an out-of-state manufacturer of containers which did not conform to Oregon's standards. He wanted to sell his containers in Oregon. Oregon did not prohibit him from transporting his containers into the state or from selling them there, but merely did not allow the containers to be used in Oregon for raspberries and strawberries. The manufacturer was challenging the Oregon

law, contending that his containers should be permitted for use in connection with these commodities. For reasons indicated in the Court's opinion, the Court concluded that the Oregon requirement was justifiable. *The case did not involve the question whether the state could require that strawberries and raspberries be packed in the State of Oregon, as a condition to shipment out of the state.* The state statute made no such requirement, and the case did not involve the question whether the state, by statute or by interpretation of the Director of Agriculture, could prohibit the transportation of strawberries and raspberries out of the state for packing elsewhere. This is amply clear from the opinion of the Court, 296 U.S. 176, at p. 184:

> "The order . . . is aimed, not at the importation or sale of other types of containers, *but at their use in Oregon by packers of raspberries and strawberries,* and the later transportation and sale of the packages. The prohibition of other types involved in prescribing the standard is nondiscriminating. It applies regardless of the origin of the containers. *The plaintiff is a manufacturer of containers, not a packer or shipper of berries.* It is not prohibited from shipping its tintop containers into Oregon; nor from selling them there . . ." (Italics supplied.)

The *Pacific States Box & Basket Co.* case has no application to the issues before this Court, and we would assume it was because of a realization of this that Appellant, who has been aware of its existence all along,[3]

[3]The case was cited by Appellant in his Reply Brief in the Court below, but on a wholly different point, namely the question of federal pre-emption.

did not see fit to make any reference whatever to this case in his Jurisdictional Statement.

II

In support of his second proposition, Appellant cites, as before, *Federal Compress and Warehouse Co. v. McLean*, 291 U.S. 17 (1934) and *Chassaniol v. City of Greenwood*, 291 U.S. 584 (1934). Among other basically distinguishing features discussed in our Motion To Dismiss Or Affirm (p. 31-34), Appellant chooses to ignore the fact that those were tax cases involving only the question of a local tax on goods (cotton) which had come to rest in a warehouse where they could remain for a long period of time before entering the stream of commerce (a fact stressed by this Court in the *Federal Compress* case, 291 U.S. 17, at p. 21, and noted as well by the three-judge Court below, at page 50 of the Transcript of Hearing of November 15, 1968), whereas here, by contrast, the product has never come to rest in Arizona at any time, but from the moment of harvest is in continual, uninterrupted movement to the packing facility, across the line of Arizona into California, where it is immediately processed, packed and loaded aboard cars for further shipment in interstate commerce.

In respect of the Court's point that the Oregon statute did not discriminate between containers manufactured in the state and those manufactured out of the state, note may be taken of the fact that Section 3-518 of the Arizona Fruit and Vegetable Standardization Law, Arizona Revised Statutes, specifically permits transportation of cantaloupes in bulk to a packer in the state. Appellant's interpretation would now effect discriminatory treatment to a grower desiring to do his packing out of state, notwithstanding that appellant has permitted this for years.

Appellant's argument to the effect that "the fact that cantaloupes have a shorter storage period than cotton is immaterial" (page 6) has no relevance whatever to the facts of this case. Cantaloupes, as the record shows, have no storage period at all and, because of their inherent characteristics, cannot have any.

III

CONCLUSION

For the reasons set forth herein and in Appellee's Motion To Disimss Or Affirm, it is respectfully submitted that Appellant has failed to show that there exist issues of such substantiality as to require further hearing by this Court, and that Appellee's Motion should be granted.

Dated, September 9, 1969.

Respectfully submitted,

JACOB ABRAMSON,

Attorney for Appellee.

EVANS, KITCHEL & JENCKES,

ABRAMSON & CHURCH,

Of Counsel.